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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 301

S/A INDUSTRIAS REUNIDAS F. MATARAZZO,
Petitioner,

v.

ARTHUR LEWIS LATIMER.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

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THE COURT PRESS, N. Y. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, S/A Industrias Reunidas F. Matarazzo, a Brazilian corporation, prays that a writ of certiorari issue to review a decree of the Court of Appeals for the Second Circuit which *reversed* an order and judgment of the United States District Court for the Southern District of New York.

Opinions Below.

The opinion of the Court of Appeals (R. 43) was filed on June 8, 1949, and has not as yet been reported. The opinion of the District Court (R. 37) was filed on December 30, 1948, and has not as yet been reported.

Jurisdiction.

The decree of the Court of Appeals for the Second Circuit was entered on June 8, 1949 (R. 49). The jurisdiction of this Court is invoked under Section 1254 of Title 28 of the United States Code.

Questions Presented.

(1) Does a foreign manufacturing corporation, created under the laws of Brazil, and doing business only in Brazil, submit itself *in personam* for all purposes to the jurisdiction of New York, by merely sending purchase orders to an independent New York buyer, a New York corporation, which does business for a number of South American corporations on a strictly commission basis, and has no discretion or judgment in filling such orders; particularly where the cause of action asserted in New York against that Brazil corporation does not arise out of and has no connection with such purchases, and where such purchases were not made in New York State (with the exception of a single purchase in 1947), but were made in other states and in Canada?

(2) Is the service of a summons on such independent buyer a valid service upon such foreign corporation?

(3) Whether under all the facts of this case, the Court of Appeals should not have affirmed the order and judgment of the District Court?

It is respectfully submitted that the decision of the Court of Appeals for the Second Circuit is in conflict with the applicable decisions of this Court.

Furthermore, that decision of the Court of Appeals will greatly affect the flow of international trade as well as interstate trade. The great number of foreign merchants and business concerns which regularly send purchase orders to independent "resident buyers" in New York and other cities in the United States, have no realization, as businessmen, that they are subjecting themselves *in personam* for all purposes to the jurisdiction of the courts where the "resident buyers" are located. Also, the decision of the Court of Appeals has a very serious element of danger for those American businessmen who regularly send purchase orders to independent "resident buyers" located in Europe, Asia, Africa and South America. Without doubt, those foreign jurisdictions will reciprocate and hold that service of process out of their courts on local "resident buyers" is valid *in personam* for all purposes against American concerns which send purchase orders to such "resident buyers".

In the instant case the District Court found as a matter of fact that the Petitioner was merely a customer of a New York buyer (R. 39), and that finding was not disturbed by the Court of Appeals which stated that the New York buyer acted as such in the United States for South American corporations in Brazil, Argentine and Colombia (R. 44).

Statutes Involved.

The relevant provisions of Section 1391 of Title 28 of the United States Code, and Federal Rules of Civil Procedure 4 (d) (3), 4 (d) (7), are set forth, *infra*, at page 21.

Statement.

This is a diversity case (R. 34), and was originally brought in the United States District Court for the Southern District of New York. The Petitioner has its only place of business in Brazil where it is engaged in the manufacture of textiles and allied industries exclusively for the South American trade (R. 19).

Petitioner does not make sales or deliver goods in the United States. Since 1945 Petitioner made only one shipment of goods to the United States, namely menthol, which was sent to the United States on consignment and remained in storage for a number of years before it could be sold (R. 31-32).

Petitioner does not make purchases in New York. With the exception of one purchase made in 1947, all of the goods purchased for Petitioner were purchased in other states or in Canada (R. 31).

Petitioner sends its order for purchases to an independent New York corporation, located in New York City, known as the Brazil Export Corporation, which is in the business of "buyer" for various South American corporations situated in Brazil, Argentina and Colombia (R. 20-21). See also opinion of the Court of Appeals (R. 44), and opinion of the District Court (R. 39).

The independent "buyer", Brazil Export Corporation, in New York City receives written purchase orders from various South American corporations, and then inquires throughout the United States and Canada to fill those orders. It has no discretion or judgment in the matter (R. 44). The goods are shipped direct by the various *sellers* to the purchasers in South America (R. 21). The compensation of the

Brazil Export Corporation is exclusively commissions (R. 21).

The Petitioner is in no way connected with the Brazil Export Corporation. None of the directors, officers or stockholders of either the Petitioner or the Brazil Export Corporation is a director, officer or stockholder of the other (R. 18, 29).

The Petitioner has no office in New York; it is not listed in any directory or telephone book in New York; it has never applied for a license to do business in New York; it has not authorized any agent or person to receive service of process in New York; and it has no assets in New York (R. 18-19).

The Petitioner has no drawing account in New York, but only an account in a New York bank into which it makes deposits to cover the issuance of letters of credit by that bank to pay for the purchases made in the United States. The "buyer", Brazil Export Corporation, never had any control or authorization with reference to that bank account (R. 31).

The action in this case has no connection whatsoever with any purchase made by the Petitioner. The action is brought by Arthur Lewis Latimer, a citizen of the State of Georgia, on a contract (R. 8-11) for services rendered and to be rendered by him at Sao Paulo, Brazil, where the alleged breach took place.

In the year 1945, the Petitioner sought to employ someone qualified to assist in establishing and operating a rayon plant at Sao Paulo, Brazil. As Latimer was in New York, therefore, for his accommodation, the terms of the contract, written in Portuguese, were sent by Petitioner to the office of the Brazil Export Corporation where it was translated into English and signed by Latimer. Brazil Export Corporation had

no discretion or judgment about the terms of the contract (R. 38).

As soon as Latimer received a signed copy of the contract, he moved to Brazil, and all his expenses therefor were paid by Petitioner (R. 19).

The contract was for three years, and from year to year thereafter, and it was contemplated that it would continue indefinitely (R. 19).

Latimer resided in Brazil for about a year and a half, until June 1947, when he returned to the United States (R. 20, 35).

Paragraph numbered 15 of the contract (R. 11) provides for the submission by the parties to the contract "to the jurisdiction" of a board of three arbitrators consisting of the American Consul at Sao Paulo, Brazil, and two others selected by the parties. After Latimer returned to the United States in 1947, Petitioner requested Latimer to select a disinterested arbitrator, but Latimer has refused to do so (R. 20), but instead commenced this action in December 1948.

The contract was performed and to be performed at Sao Paulo, Brazil; the alleged breach took place at Sao Paulo, Brazil; all the witnesses are in Brazil and speak only Portuguese; all of the proof is available at Sao Paulo, Brazil; by the terms of the written contract Latimer has expressly agreed to submit "to the jurisdiction" of an arbitration board at Sao Paulo, Brazil; and Petitioner is ready and willing to arbitrate and has twice requested Latimer to select his arbitrator (R. 34-35).

Specifications of Error to Be Urged.

The Court of Appeals for the Second Circuit erred in holding:

1. That the Petitioner was "present" in New York subject to judgment *in personam* for all purposes.

2. That the Petitioner was "doing business" in New York.

3. That the service of process on the Brazil Export Corporation was sufficient and valid as against the Petitioner to sustain jurisdiction *in personam*.

4. That the record was insufficient to base refusal of jurisdiction under the doctrine of *forum non conveniens*.

Reasons for Granting the Writ.

1. The Court of Appeals for the Second Circuit has decided an important question of federal law in conflict with the applicable decisions of this Court. The question is of great general importance, and the public interest will be beneficially served by the settlement thereof by this Court.

2. The Court of Appeals for the Second Circuit has decided an important question of New York local law in conflict with the applicable decisions of the New York courts.

It is important to emphasize that the Brazil Export Corporation, the New York corporation, is an inde-

pendent, separate corporate entity from the Petitioner (R. 18-19). The Brazil Export Corporation is in no sense subject to ownership or control by the Petitioner. It is not a stockholder of the Petitioner, nor is Petitioner a stockholder of it (R. 18). No stockholder of either corporation is a stockholder of the other (R. 30). The Brazil Export Corporation is in business on its own account as a "buyer" for various South American corporations. These facts were found by the Judge in the District Court (R. 39), and his findings of fact were not disturbed in the opinion of the Court of Appeals (R. 44).

Consequently, anyone reading this case in the courts below is faced with the startling and novel proposition of law that a foreign corporation purchasing goods through an independent "resident buyer", subjects itself *in personam* for all purposes to the jurisdiction of the courts of the state where the "buyer" is located, even though the goods were not actually purchased in that state and the cause of action did not arise out of any of such purchases.

What the ordinary man, engaged in business or commerce, would consider as "doing business", is the test of jurisdiction over a foreign corporation. As was said by this Court in the case of *United States* v. *Scophony* (1948), 333 U. S. 795 at p. 807, 92 L. ed. 1091 at p. 1100:

> "The practical everyday business or commercial concept of doing or carrying on business 'of any substantial character' became the test of venue."

And this Court went on to say (p. 808), that that test substituted

> "practical, business conceptions for the previous

> hair-splitting legal technicalities encrusted upon the 'found'—present'—'carrying-on-business' sequence".

There has been endless discussion in the decided cases as to what "criteria" determine whether a foreign corporation is "doing business" in another state. Most of such "criteria" are misleading and are now made obsolete by the *everyday businessman's* test laid down by this Court (see p. 8 above).

One of such so-called "criteria" is the term "continuity". But the question of "doing business" is not a question of time. A man who exploits a local market is "doing business" from the moment he starts.

"Isolated transactions" is another of such "criteria". But that term also is a reference to time, namely, lack of continuity. A man might be able to corner and exploit a market by a few isolated transactions, and then get out of the market after he has made his profit.

"Exclusive buyer" is another of such "criteria". But an American businessman might send all his purchase orders to only one "buyer" in Brazil or China, who is found to be honest, efficient and capable. It would not be good business sense to hold that where a businessman sends all his orders to one "buyer", he is "doing business", but another businessman who sends twice that number of purchase orders to many "buyers" is not "doing business".

"Local representative" is another of such "criteria". But that is a universal term used by all "buyers", and it means no more than that the services of a local resident are used by a foreign resident. If that is "doing business" then the test of "doing busi-

ness" can be stated very simply as *qui facit per alium facit per se*. But that is directly contrary to the express holding of this Court in the case of *Bank of America* v. *Whitney Central National Bank*, 261 U. S. 171 at 173 (see p. 11, *infra*).

The *practical businessman's* test laid down by this Court can be readily applied by the everyday businessman without his becoming involved in hair-splitting legal technicalities. This can be readily shown by a simple question, for example: Under what state of facts would the everyday American businessman, whose only factory is located in New York, think he is doing business in Brazil?

He certainly would not think that he was "doing business" in Brazil by merely mailing purchase orders to an independent "buyer" located in Brazil. Such an American businessman might have to purchase goods for his factory regularly not only in Brazil but in a number of other foreign countries or states, and he would be startled if he were told that he is "doing business" in each one of those foreign countries and states; and, it would never occur to him that he was "doing business" in Brazil by mailing orders to an independent "buyer" located in Brazil for the purchase of goods, not in Brazil, but in Colombia and Argentina.

On the other hand, he would know that he was "doing business" in Brazil, if he opened an office there with a staff of his own employees, and notoriously held himself out, by listing his name in the local business and telephone directories, etc., as actively engaged in the exploitation of the *local* market in Brazil.

Even where the officers of a foreign corporation go regularly into the state of the forum to purchase a

large portion of its requirements, it is not "doing business" in that state. In the case of *Rosenberg* v. *Curtis* (1923), 260 U. S. 516, 67 L. ed. 372, this Court held that the defendant therein, a corporation doing a retail business in a foreign state, was not "doing business" in New York, the state of the forum, merely because the defendant regularly purchased in New York a large portion of its merchandise. This Court held that visits to New York by defendant's officers to make such purchases, even if regularly made, did not warrant the inference that defendant was "doing business" in New York. In that case the defendant's president was served in New York. And it is important to note that in that case the defendant itself came into New York and regularly gave its purchase orders direct to the *sellers* in New York. It, therefore, seems illogical to say that if that foreign corporation had mailed in its purchase orders to a "resident buyer" in New York, it was "doing business"; or to say, as in the instant case, that to send purchase orders to a "resident buyer" in New York to make purchases in Texas and Canada, is "doing business" in New York.

In an analogous case, *Bank of America* v. *Whitney Central Nat. Bank* (1923), 261 U. S. 171 at 173, 67 L. ed. 594 at 596, this Court said:

> "The Whitney Central had what would popularly be called a large New York business. The transactions were varied, important, and extensive. But it had no place of business in New York. None of its officers or employees was resident there. Nor was this New York business attended to by any one of its officers or employees resident elsewhere. Its regular New York business was transacted for it by its correspondents,—the six

independent New York banks. They, not the Whitney Central, were doing its business in New York. In this respect their relationship is comparable to that of a factor acting for an absent principal. The jurisdiction taken of foreign corporations, in the absence of statutory requirements or express consent, does not rest upon a fiction of constructive presence, like *qui facit per alium facit per se*. It flows from the fact that the corporation itself does business in the state or district in such a manner and to such an extent that its actual presence there is established."

The law in New York is definitely established in accordance with the decisions of this Court. In *Greenberg* v. *Lamson Bros. Co.* (First Dept. 1947), 273 App. Div. 57, 75 N. Y. S. 2d 233, the defendant, a foreign corporation, purchased *millions* of dollars worth of goods regularly each year in New York. The court held (273 App. Div. at 61):

"The law is clear that purchases in New York by a foreign corporation of a large part of the merchandise to be sold at its place of business outside the State, even if systematic and made upon visits occurring at regular intervals do not warrant a holding that the corporation was present within the jurisdiction of this State.

* * * *

"In the final analysis, it would indeed be farfetched to hold that a department store retailing merchandise exclusively within the State of Ohio was 'doing business' within the State of New York, when it sold not a single dollar's worth of merchandise in this State, when it solicited no

> orders in this State for the sale of its merchandise, when practically all that it did here was to buy its merchandise and in connection with such purchases utilized the facilities of a 'resident buyer'."

The case just mentioned, *Greenberg* v. *Lamson*, was cited with approval in a very recent New York case, *Sterling Novelty Corp.* v. *Frank & Hirsch Distributing Co.* (1949), 299 N. Y. 208. However, in the latter case the facts were very different, and the court found that the local "buyer" had no other customers but the defendant foreign corporation, and was, in fact, the same "identity" as the defendant. That court, also, mentioned various "criteria" of "doing business" including the term "exclusive buying agent", by which the court meant that the "buyer" did not buy for anyone other than the defendant foreign corporation. That is a new meaning and definition of "exclusive agent".

The correct and established meaning of "exclusive agent" is an agent who does not have to compete with other *agents* of his principal. See Restatement of the Law, Agency, Sec. 449 (b). That is entirely different from a situation where the agent agrees not to act for any other *principal*. The latter is what the court, in the case just cited, intended to say, namely, that the local "buyer" was the same "identity" as the defendant foreign corporation and represented only that one principal to the exclusion of all others. The court made its meaning clear by saying (299 N. Y. at 212):

> "We deem it worth remarking that this is not a case in which the foreign corporation's only ties with this State were through an independent resident buyer who acted for many other purchasers

> at the same time, (see, *e. g., Greenberg* v. *Lamson Bros. Co.,* 273 App. Div. 57)."

In the instant case, it is quite evident that the defendant, doing business exclusively in Brazil, has no contact, ties or relations with the State of New York, and that the mere sending of written purchase orders from Brazil to an independent "buyer" in New York who acted as buyer for a number of other customers, does not create any contact, tie or relation between the Brazilian corporation and the State of New York, especially where all the purchases were made outside of the State of New York.

As was said in *International Shoe Co.* v. *State of Washington* (1945), 326 U. S. 310 at 319, 90 L. ed. 95, with reference to the due process clause:

> "That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contact, ties or relations."

Purchasing goods in other states outside of New York is not doing business in New York; and it seems strange, in the instant case, that the Court of Appeals gave no weight to the facts as to where the goods were purchased. In other words, if a Brazilian corporation writes to an independent "resident buyer" located in New York, requesting him to purchase goods in Canada, then, under the Court of Appeals decision, that Brazilian corporation has submitted itself *in personam* for all purposes to the New York jurisdiction.

In the case of *Hutchinson* v. *Chase and Gilbert* (C. C. A. 2d 1930), 45 Fed. 2d 139, the Court of

Appeals for the Second Circuit took the opposite position to its instant decision. In that case the defendant, a Massachusetts corporation, entered into an agreement in New York for plaintiff's services to be rendered in New York for the purchase of securities from time to time. The summons was served in New York on the defendant's vice president. The facts show that the defendant itself leased a small office in New York; that the defendant's name was on the door and in the New York telephone book; that the defendant used the office from time to time to bargain for the purchase of securities; and that defendant kept a small bank account in New York. The Court of Appeals held that under the circumstances the defendant was not "present" in New York, and dismissed the summons and complaint.

In the instant case the Court of Appeals in its opinion reverts back to the legal concept of "presence"; and the court splits that legal concept into two parts. The first part is "presence" with reference to the service of process; and the second part is "presence" with reference to *forum non conveniens* (R. 45). The only case cited by the Court of Appeals in support of its holding that this Petitioner was "present" in New York for the purpose of service of process *in personam,* is the case of *Bomze* v. *Nardis Sportswear, Inc.* (C. C. A. 2d 1948), 165 Fed. 2d 33. That case, it is respectfully submitted, is not in point. That case comes under the familiar rule that where a foreign corporation solicits sales in a State and regularly makes deliveries of the goods *in that State,* it is definitely exploiting the local market and is "doing business" in that State.

In the instant case the Petitioner did not solicit,

make sales or make deliveries of goods in New York State (R. 31, 33). In fact, the Petitioner did not even make purchases in New York State, with the exception of one single purchase in 1947 (R. 31, 33). And the Petitioner maintains no office in New York State for the doing of business, and is not listed in any telephone book or directory in New York (R. 18, 19 and 33). Certainly, it cannot be said that the Petitioner exploited the local New York market.

3. On the facts of this case the Court of Appeals should have declined jurisdiction in the interest of justice. See *Canada Malting Co.* v. *Paterson Steamships* (1931), 285 U. S. 413, at 422, 423, 76 L. ed. 837, at 842, 843, where this Court said:

> "Obviously, the proposition that a court having jurisdiction must exercise it, is not universally true, * * * Courts of equity and of law occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or nonresidents or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal."

There can be no dispute by Latimer that the contract in suit was performed and to be performed in Brazil; that he agreed in writing to submit "to the jurisdiction" of an arbitration board headed by the American Consul at Sao Paulo, Brazil; and that the Petitioner made written demand upon him to name a disinterested arbitrator (R. 34). Furthermore, all Petitioner's witnesses, willing and unwilling, are at Sao Paulo, Brazil, and they all talk Portuguese; and Latimer by consenting and agreeing in writing to submit "to the jurisdiction" (R. 11) of a board of arbi-

tration at Sao Paulo, Brazil, has *yielded and surrendered* any right he might have to sue in New York. That agreement to submit to the jurisdiction of an arbitration board is an important part of the contract and of Latimer's consideration therefor.

In the case of *Gilbert* v. *Burnstine* (1931), 255 N. Y. 348, a contract was made in New York which contained an agreement to arbitrate in London, England. The court held that the agreement was irrevocable, and could not be deprived of its enforceability by parties seeking to avoid it. "Otherwise" (said the court at p. 354) "the inference must be drawn that they never intended to abide by their pledge."

In addition to the fact that Latimer consented and agreed, as part of his signed contract, to submit "to the jurisdiction" of an arbitration board at Sao Paulo, Brazil, the facts of this case indicate that as a matter of justice the case should be tried at Sao Paulo, Brazil.

In the case of *Williams* v. *Green Bay* (1945), 326 U. S. 549 at 554, 90 L. ed. 311 at 315, this Court said that the doctrine of *forum non conveniens,*

> "was designed as an 'instrument of justice'. Maintenance of a suit away from the domicile of the defendant—whether he be a corporation or an individual—might be vexatious or oppressive."

The test, therefore, of the doctrine of *forum non conveniens* is the test of doing justice.

In the case of *Gulf Oil* v. *Gilbert* (1946), 330 U. S. 501 at 507, 91 L. ed. 1055, the court said:

> "The principle of *forum non conveniens* is simply

> that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute. These statutes are drawn with a necessary generality and usually give a plaintiff a choice of courts, so that he may be quite sure of some place in which to pursue his remedy. But the open door may admit those who seek not simply justice but perhaps justice blended with some harassment. A plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most convenient place for an adversary, even at some inconvenience to himself."

And at page 508:

> "Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; the possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive."

Also, at page 509:

> "There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself."

In the case of *International Shoe* v. *State of Washington* (1945), 326 U. S. 310, 90 L. ed. 95, the court said that where a foreign corporation's activities in a

state are not enough to subject it to suit on causes of action unconnected with its activities there, then (at p. 317):

> "To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process."

In the case of *Hutchinson* v. *Chase and Gilbert* (C. C. A. 2d 1930), 45 Fed. 2d 139, the court said, at page 141:

> "* * * the loss and inconvenience to ordinary corporations from being sued wherever they may chance to have any dealings whatever, cannot properly be ignored, and may constitute a test of jurisdiction, just as they do of venue, really a kindred matter."

It is respectfully submitted that in the instant case the Judge in the District Court rightly avoided getting involved in the technicalities of legal definition of "presence", "found", etc. Instead, the District Judge took into consideration the facts and circumstances of this particular case and then decided this case promptly on the "practical every day business or commercial concept" of "doing business". See *United States* v. *Scophony* (1948), *supra*, page 8. See also Section 1391 of Title 28 of the United States Code as revised effective September 1, 1948, where the test of jurisdiction over a foreign corporation is whether it is "doing business", not whether it is "present", "found", etc. See *infra*, page 21.

CONCLUSION.

For the reasons above stated, we believe that the decision of the District Judge should not have been reversed by the Court of Appeals; and it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

LEONARD G. BISCO,
Attorney for Petitioner.

August 26, 1949.

APPENDIX.

Section 1391 of Title 28:

"§ 1391. Venue generally.

* * * *

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

Rule 4 of the Federal Rules of Civil Procedure.

"Rule 4. Process

* * * *

(d) Summons: Personal Service.

* * * *

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

* * * *

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this sub-

division of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state."

Law of New York State re service of process.

"Sec. 229. Personal service of summons upon foreign corporation. Personal service of summons upon a foreign corporation must be made by delivering a copy thereof, within the state, as follows:

1. To the president, vice president, treasurer, secretary or assistant secretary; or, if the corporation lack either of those officers, to the officer performing corresponding functions under another name.

2. To a person or public officer designated for the purpose pursuant to law by certificate filed in the department of state, the department of banks or insurance, whose designation is in force, or if a designee, other than a public officer, has died, resigned or removed from the state, the secretary of state as provided by the general corporation law. If service be made pursuant to section two hundred sev-

enteen of the general corporation law, the time within which the corporation is required to appear or answer shall be deemed to be extended ten days whether the action is brought in a court of record or not of record.

3. To the cashier, a director or managing agent of the corporation, within the state, if service cannot be effected under subdivision two of this section, or an officer of the corporation specified in subdivision one of this section, with due diligence, cannot be found within the state."